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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES AND PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

APPENDIX TO JOINT PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH JUDICIAL CIRCUIT

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Article XVII of the Constitution of Washington provides as follows:

ARTICLE XVII

TIDE LANDS

§ 1 DECLARATION OF STATE OWNERSHIP. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided,* that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

Harbors and tide waters: Art. 15.

Chapter 2.60 of the Revised Code of Washington provides:

> **2.60.010 Definitions.** As used in this chapter:
>
> (1) The term "certificate procedure" shall mean the procedure authorized herein by which a federal court in disposing of a cause pending before it submits a question of local law to the supreme court for answer;
>
> (2) The term "federal court" means any court of the United States of America including the supreme court of the United States, courts of appeal, district courts and any other court created by act of congress;
>
> (3) The term "supreme court" shall mean supreme court of Washington;
>
> (4) The term "record" shall mean: (a) A stipulation of facts approved by the federal court showing the nature of the case and the circumstances out of which the question of law arises or such part of the pleadings, proceedings and testimony in the cause pending before the federal court as in its opinion is necessary to

enable the supreme court to answer the question submitted; (b) a statement of the question of local law certified for answer. The record shall contain a certificate under the official seal of the court, signed by the chief judge of a multi-judge federal court or judge of the district court utilizing certificate procedure stating that the record contains all matters in the pending cause deemed material for consideration of the local law question certified for answer;

(5) The term "supplemental record" shall mean the original or copies of any other portion of the proceedings, pleadings and testimony before the federal court deemed desirable by the supreme court in the determination of the local law question certified for answer. The supplemental record shall contain a certificate under the official seal of the court signed by the chief judge of such multi-judge federal court or judge of the district court, certifying that the supplemental record contains all additional matters requested;

(6) The term "opinion" shall mean the written opinion of the supreme court of Wash-

ington and shall include the certificate of the clerk of such court under seal of court stating that the opinion is in answer to the local law question submitted. [1965 c 99 § 1.]

2.60.020 Federal court certification of local law question. When in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto. [1965 c 99 § 2.]

2.60.030 Practice and procedure. Certificate procedure shall be governed by the following provisions:

(1) Certificate procedure may be invoked by a federal court upon its own motion or upon the motion of any interested party in the litigation involved if the federal court grants such motion.

(2) Certificate procedure shall include and be based upon

the record and may include a supplemental record.

(3) Certificate procedure costs shall be equally divided between plaintiff and defendant, subject to reallocation as between or among the parties by the federal court involved.

(4) The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within thirty days after the filing of the record in the supreme court. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within twenty days after receipt of appellant's or moving party's brief and a reply brief shall be filed within ten days. Time for filing record, supplemental record or briefs may be extended for cause.

(5) Oral argument as in other causes on the merits may be had upon request of the supreme court or upon application of any interested party in the certificate procedure.

(6) The supreme court shall forward to the federal court utilizing certificate procedure its opinion answering

the local law question submitted.

(7) The supreme court may adopt rules of practice and procedure to implement or otherwise facilitate utilization of certificate procedure. [1965 c 99 § 3.]

2.60.900 Short title. This act may be cited as the "Federal court local law certificate procedure act." [1965 c 99 § 4.]

Chapter 90.58.020 of the Revised Code of Washington (the Shoreline Management Act of 1971) provides:

> **90.58.020 Legislative findings--State policy enunciated--Use preference.** The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition, it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consis-

tent with the public interest. There is, therefor, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of

state-wide significance. The department, in adopting guidelines for shorelines of state-wide significance, and local government, in developing master programs for shorelines of state-wide significance, shall give preference to uses in the following order of preference which:

(1) Recognize and protect the state-wide interest over local interest;

(2) Preserve the natural character of the shoreline;

(3) Result in long term over short term benefit;

(4) Protect the resources and ecology of the shoreline;

(5) Increase public access to publicly owned areas of the shorelines;

(6) Increase recreational opportunities for the public in the shoreline;

(7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

In the implementation of this policy the public's oppor-

tunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. Alterations of the natural condition of the shorelines and wetlands of the state shall be recognized by the department. Shorelines and

wetlands of the state shall be appropriately classified and these classifications shall be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes. Any areas resulting from alterations of the natural condition of the shorelines and wetlands of the state no longer meeting the definition of "shorelines of the state" shall not be subject to the provisions of chapter 90.58 RCW. -

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water. [1982 1st ex.s. c 13 § 1; 1971 ex.s. c 286 § 2.]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian Tribe
and individual allottees,
Plaintiff-Appellee,

and

KALISPEL INDIAN TRIBE,
Intervening-Plaintiff,

v.

PEND OREILLE PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corp.,
Defendant,

and

DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-Intervenor-Appellant.

No. 88-3617
D.C.No. CV-80-116-JLQ

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian
Tribe and individual allottees,
Plaintiff-Appellee,

and

KALISPEL INDIAN TRIBE,
Intervening-Plaintiff,

v.

PEND OREILLE PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corp.,
Defendant-Appellant,

and

DEPARTMENT OF NATURAL
RESOURCES, STATE OF WASHINGTON,
Defendant-Intervenor.

No. 88-3618
D.C.No. CV-80-116-JLQ

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian
Tribe and individual allottees,
Plaintiff-Appellant,

and

KALISPEL INDIAN TRIBE,
Intervening-Plaintiff,

v.

PEND OREILLE PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corp.,
Defendant-Appellee,

and

DEPARTMENT OF NATURAL
RESOURCES, STATE OF WASHINGTON,
Defendant-Intervenor.

No. 88-3619
D.C.No.
CV-80-116-JLQ

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian
Tribe and individual allottees,
Plaintiff,

and

KALISPEL INDIAN TRIBE,
Intervening Plaintiff-Appellant,

v.

PEND OREILLE PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corp.,
Defendant-Appellee,

and

DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON,
Defendant-Intervenor-Appellee.

No. 88-3669
D.C.No. CV-80-116-JLQ

APPEAL FROM: United States District Court for the Eastern District of Washington
Richard M. Bilby and Justin L. Quackenbush, District Judges, Presiding

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Argued and submitted:
October 30, 1989-Seattle, Washington
Filed: March 6, 1991

OPINION

BROWNING, Circuit Judge:

The Kalispel Indian Reservation in northeastern Washington was established by President Woodrow Wilson by Executive Order No. 1904 on March 23, 1914. The Pend Oreille River forms the western boundary of the reservation. In 1955 the Pend Oreille Public Utility District (PUD) completed construction of the Box Canyon Dam downstream from the reservation.

SUMMARY

Native Americans

Affirming in part, vacating in part and remanding a district court judgment, the court of appeals held that payment by the Indian Claims Commission to an Indian Tribe for the taking of its ancestral lands by the federal government prevented the Tribe's claims to a riverbed in the reservation based upon aboriginal title.

The Pend Oreille River forms the western boundary of the Kalispel Indian Reservation in Washington. In 1955, the Pend Oreille Public Utility District completed construction of a dam downstream from the reservation. Prior to construction of the dam, the water level of the river as it passed the reservation reached approximately 2041 feet during the spring, receded to 2022 feet by late summer, and

remained at that level until the following spring. Because of the dam, land once flooded only in the spring was under water all year. The United States brought a trespass action against PUD on behalf of the Kalispel Tribe and individual Kalispel Indian allottees, alleging the dam submerged riparian land traditionally used by the Tribe for agricultural purposes, and seeking damages and injunctive relief. The Tribe filed a complaint in intervention asserting title to the bed of the river and seeking compensation for trespassory use. The State intervened, claiming sovereign title to the riverbed had passed to the State upon its admission to the Union. The Tribe also sought to amend its complaint to assert a right to use of the waters of the river, but the district court denied the motion as

untimely. The district court ruled for the Tribe, concluding that by raising the level of the river the PUD trespassed on the Tribe's riparian lands. However, the court ruled that the State, not the Tribe, had title to the riverbed.

[1] Both federal and state law mandated exclusion of annual spring floods in calculating the ordinary high water live of the river in question. [2] The Ninth Circuit has rejected the mistaken assumption that the annual spring floods of the river determine the ordinary high water line. [3] The court noted that the determinative factual issue was whether, prior to construction of the dam, the lands between the elevations of 2028 and 2041 feet, though subject to seasonal flooding, were nonetheless useful for agricultural or grazing purposes. The

district court's finding that they were was well supported by the record.

[4] Concerning the Tribe's claim of aboriginal title to the riverbed, the court noted that it has repeatedly held that payment of a compensation award by the Indian Claims commission for a taking of tribal aboriginal lands conclusively establishes that the aboriginal title has been extinguished. Thus, the court's inquiry was limited to whether the taking of the riverbed was in fact adjudicated by the Commission. [5] The district court properly found that compensation to the Tribe by the Commission for takings of tribal lands prevented the Tribe from asserting a claim to the riverbed based upon aboriginal title.

[6] The court rejected as insufficient as a matter of law the Tribe's

factual claims that it had acquired title to the riverbed as part of a de facto reservation. [7] A party seeking to establish that a grant by the federal government includes the bed of a navigable river must meet a heavy burden. Here, the proof offered by the Tribe was insufficient to overcome this strong presumption against conveyance of a riverbed. [8] However, the district court erred in denying the Tribe's motion to amend its complaint in intervention to assert a claim under *Winters v. United States*. Therefore, the district court's judgment on this issue was reversed and remanded for reconsideration of the motion.

Prior to construction of the dam, the water level of the river as it passed the reservation reached approximately 2041 feet during the spring, receded to 2022

feet by late summer, and remained at that level until the following spring. After completion of the dam, the spring level remained at 2041 feet, but during the remaining months of the year the water level rarely dropped below 2032 feet. Thus, because of the dam, land once flooded only in the spring was under water all year.

The United States brought a trespass action against the PUD on behalf of the Kalispel Indian Tribe and individual Kalispel Indian allottees, alleging the dam submerged riparian land traditionally used by the Tribe for agricultural purposes, and seeking damages and injunctive relief.

The Tribe filed a complaint in intervention asserting title to the bed of the river and seeking compensation for

trespassory use. The Tribe also jointed in the claim for trespass on riparian lands asserted on its behalf by the United States. The State intervened, alleging sovereign title to the riverbed has passed to the State upon its admission to the Union. The Tribe also sought to amend its complaint to assert a right to use of the waters of the river under *Winters v. United States*, 207 U.S. 564 (1908). The district court denied the motion as untimely. The United States did not join the Tribe in its assertion of ownership of the riverbed or the right to use the waters of the river under *Winters*.

The district court divided the trial into three phases. Phase 1 was devoted to the issue of liability for trespass on riparian lands. Phase 2 was devoted to the dispute between the Tribe and the

State over title to the riverbed. Phase 3 dealt with remedies.

After a bench trial in Phase 1, the court ruled in favor of the Tribe, concluding that by raising the level of the river the PUD trespassed on the Tribe's riparian lands. The State and the PUD appealed this ruling. The district court ruled in favor of the State in Phase 2, holding that the State, not the Tribe, had title to the riverbed.[1] The Tribe appealed this ruling. In Phase 3 the court awarded the Tribe damages for the trespass but denied injunctive relief. The issues raised in Phase 3 are the subject of a separate appeal.

---

[1]The parties dispute the nature of the proceedings in Phase 2. The State and PUD assert a bench trial took place. The Tribe maintains the district court ruled against it on a motion for summary judgment.

I

Following the district court's approach, we first consider whether the dam caused the waters of the river to trespass upon the Tribe's riparian lands where the river borders the reservation.[2] The parties agree that the ordinary high water line of the river marks the boundary between riparian lands and riverbed. If the dam raised the river above this line a trespass upon the Tribe's riparian lands occurred. The dispute is over the location of this line.

The district court held the ordinary high water line of the river as it flows past the reservation lay at an elevation of 2028 feet. Since all lands below 2032

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[2]For the purpose of Phase 1 of the trial, title to the riverbed was assumed to be in the State. We address the Tribe's conflicting claim to the riverbed in Part II.

feet are now permanently submerged, the court concluded operation of the dam trespassed on the Tribe's riparian lands.

The State and the PUD contend the ordinary high water line lay at an elevation 2041 feet, and because the dam does not raise the river above that level no trespass occurred. They argue the district court's contrary ruling is based upon a misconstruction of the applicable law and a clearly erroneous finding of fact.

A

We first address the claim that the district court misconstrued the applicable law.

The State and the PUD argue that the line of ordinary high water is properly defined as the highest level reached by the stream each year, including the annual

spring flood, averaged over a period of years. This formula places the ordinary high water line at 2041 feet. The United States and the Tribe contend that the line of ordinary high water is the line below which action of the water precludes the growth of useful land vegetation. This line corresponds with the highest level normally reached by the river each year, but excluding the annual spring rise. The district court found that prior to construction of the dam this line had lain at 2028 feet.

[1] Federal and state law are the same on the definitional issue determinative of Phase 1 and we therefore need not resolve which controls. Both mandate exclusion of annual spring floods in calculating the ordinary high water line.

[2] The federal rule was stated in *Howard v. Ingersoll*, 54 U.S. (13 How.) 409 (1851). The Supreme Court said:

> [The riverbed] neither takes in overflow land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture.

Id. at 446. Under *Ingersoll*, lands periodically submerged but still useful for agricultural purposes are thus above the ordinary high water line. More recently, this Circuit followed the *Ingersoll* approach in *United States v. Claridge*, 416 F.2d 933, 934 (9th Cir. 1969), rejecting "the mistaken assumption that the annual spring floods of the river" determine the ordinary high water line. *Accord Borough of Ford City v.*

United States, 345 F.2d 645, 648 (3d Cir. 1965).

The Washington Supreme Court adopted the same rule in *Austin v. City of Bellingham*, 126 P. 59 (1912):

> "High-water mark does not mean the height reached by unusual floods; for these usually soon disappear. Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes; nor yet does it mean meadow land adjacent to the river, which, when the water leaves it, is adapted to and can be used for grazing or pasturing purposes. The line, then, which fixes the high-water mark is that which separates what properly belongs to the river bed from that which belongs to the riparian owner; that is, the owner of adjoining land. Soil which is submerged so long or so frequently, in ordinary seasons, that vegetation will not grow on it may be regards as a part of the bed of the river which overflows it."

Id. at 61 (quoting 4 *Words and Phrases* at 3290). The rights of the State to the riverbed, the court continued, "are limited to the line of ordinary high water, and not to the line of the highest water that may be proved."[3] *Id.*

---

[3]We reject the arguments advanced by the State and the PUD to avoid *Austin*. Contrary to their argument, *Austin*'s statement of the rule is not ambiguous in any respect relevant to this case. Neither is it dicta; and if it were, it would still be the best evidence as to how the Washington Supreme Court would decide the issue.

The State's argument that it is not bound by *Austin*'s statement of the law because the State was not a party to the suit is frivolous.

We also reject the State's suggestion that we defer to the administrative practice of Washington's Department of Natural Resources in determining the ordinary water mark--Washington law is determined by the Supreme Court of the State, not by its executive agencies. The Washington Court may consider contrary administrative practice a reason for changing the rule adopted in *Austin*, *see Overton v. Washington State Economic Assistance Auth.*, 637 P.2d 652, 654 (Wash. 1981), but we may not. The same is true of the argument that placing the ordinary high water mark at a higher elevation would serve the public interest by preserving

Thus, whether state or federal law controls, the district court properly excluded the annual rise of the Pend Oreille River in determining the river's ordinary high water line.

B

[3] The State and the PUD also challenge several of the district court's

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state ownership over shoreline areas valuable for public recreation; as well as the suggestion that the rule applicable to tidelands (that the line of ordinary high water is the mean high tide over a period of time) should be applied to non-tidal waters as well. The relevant question is what Washington law now is, not what it should be or may become.

Finally, we reject the contention of the State and the PUD that we should certify this issue to the Washington Supreme Court or stay our decision pending the outcome of a related case now working its way through the Washington courts. Certification is inappropriate when, as here, the supreme court of a state has already ruled and its decision is unambiguous. *See City of Houston v. Hill*, 482 U.S. 451, 470-71 (1987); *In re Elliott*, 446 P.2d 347, 358 (Wash. 1968). For the same reason, we decline to stay our decision.

subsidiary findings of fact. The determinative factual issue, however, was whether, prior to construction of the dam, the lands between the elevations of 2028 and 2041 feet, though subject to seasonal flooding, were nonetheless useful for agricultural or grazing purposes, *see Ingersoll*, 54 U.S. at 446; *Austin*, 126 P. at 61; and the district court's finding that they were is well supported by the record.

Hydrological calculations established that prior to the construction of the dam, lands at 2028 elevation were above the level of the river for three quarters of the year. Witnesses testified that prior to construction, hay was harvested, livestock was pastured and wild carrots and onions were gathered on lands at and below the 2028 foot elevation. As the

district court noted, before operating the dam the PUD itself obtained from individual Indian allottees flowage easements that provided:

> During the haying season which is approximately July 1 to September 15th of each year,... Box Canyon Dam gates will be operated so that the level of the water ... will not exceed elevation 2028 feet.[4]

In addition, visual inspection by the district court judge revealed partially submerged tree stumps near the 2028 level.

---

[4]The PUD contends the easements were offered in settlement of a dispute with individual Indian allottees and were therefore inadmissible under Federal Rule of Evidence 408. Rule 408 only bars admission of settlement offers "to prove liability for or invalidity of the claim or its amount." Fed.R.Evid. 408. "This rule ... does not require exclusion when the evidence is offered for another purpose ...." *Id.; see also United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d 949, 956 (5th Cir. 1990) ("Fed.R.Evid. 408 permits settlement evidence for any purpose except to prove or disprove liability or the amount of the claim.") Here, the easements were introduced only to prove that the disputed lands were suitable for agricultural use prior to construction of the dam.

In light of all this, we cannot say the district court's finding that the high water line was at an elevation of 2028 feet is clearly erroneous.

II

We turn to the dispute between the Tribe and the State over ownership of the riverbed. The Tribe asserts beneficial title to the riverbed on two bases. First,the Tribe claims unrelinquished aboriginal title to the bed of the river, based upon possession from time immemorial. Second, the Tribe contends that prior to Washington's admission to the Union in 1889 the United States established a de facto reservation for the Tribe that included the riverbed.[5]

---

[5]The Tribe also appears to suggest the 1914 Executive Order establishing the current Reservation may have conveyed the riverbed to the Tribe. Such a claim would be meritless. When Washington was admitted to the Union in

A

We first address the Tribe's claim of aboriginal title. A tribe has aboriginal title to lands occupied exclusively by the tribe as its ancestral home. *United States ex rel. Hualpai Indians of Ariz. v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 345 (1941). For the purposes of this appeal, the parties have assumed the Tribe had aboriginal title to the area involved in this litigation, including the riverbed, prior to admission of Washington State to the Union in 1889. The State contends, however, that the United States

---

1889, ownership of the riverbed passed from the United States to the State under the Equal Footing Doctrine. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 238, 258 (1845). When the Executive Order issued, the United States had no title or other claim to the riverbed it could convey to the Tribe by Executive Order, Act of Congress, or otherwise.

extinguished the Tribe's aboriginal title by taking, and that receipt by the Tribe of compensation for the taking following proceedings before the Indian Claims Commission "establishes conclusively that a taking occurred." *United States v. Dann*, 873 F.2d 1189, 1199 (9th Cir. 1989).

The Indian Claims Commission was established by Congress in 1946, 25 U.S.C. § 70 (1963), to award compensation for taking of Indian lands by the federal government. *Id.* § 70a(4) (Supp. 1982). The Tribe filed a complaint with the Commission in 1951 seeking compensation for the taking of its ancestral lands. The petition alleged the Tribe had occupied a large area of lands in the states of Washington, Idaho, and Montana "from time immemorial," and that the United States "did forcibly seize and take

from [the Tribe] the said lands" without compensation. Petition of Kalispel Tribe before The Indian Claims Commission ¶ ¶ 4.5. After seven years of litigation the Commission held in favor of the Tribe. The Commission found that "the United States, without [the Tribe's] consent, began acquiring or disposing of said lands for its own use and benefit ... until the [Tribe] was deprived of the entire tract. ... [T]he [Tribe] received no compensation for any part of the same." *The Lower Pend D'Oreille or Kalispel Tribe of Indians v. United States*, 6 Ind. Cl. Com. 353, 368 (June 9, 1958). After five years of settlement negotiations, the United States agreed to pay the Tribe $3,000,000 in compensation for the taking of its aboriginal lands. This stipulated settlement was approved by the Commission on

March 21, 1963. *Lower Pend D'Oreille or Kalispel Tribe of Indians v. United States*, 12 Ind. Cl. Com. 141 (March 21, 1963), and was paid by the United States in due course.

[4] "The 'chief purpose of the Act [establishing the Commission] was to dispose of the Indian claims problem with finality.'" *United States v. Dann*, 470 U.S. 39, 45 (1985) (quoting H.R. Rep. No. 1466, 79th Cong., 1st Sess., 10 (1945)). Consistent with this purpose, this court has repeatedly held that payment of a Commission award of compensation for a taking of aboriginal lands conclusively establishes that the aboriginal title has been extinguished. *United States v. Dann*, 873 F.2d 1189, 1194 (9th Cir. 1989); *United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir. 1976). Our inquiry is

therefore limited to whether the taking of the riverbed was in fact adjudicated by the Commission.[6] We think it is plain that it was.

The parties agree the land for which the Tribe sought compensation before the Commission measured 2,373,000 acres if the lands beneath the Pend Oreille River and other rivers and lakes were included, and 2,247,000 acres if the submerged lands

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[6]The Tribe appears to challenge the correctness of the Commission's finding that the riverbed was taken by the United States. The Tribe points out that it did not formally cede its aboriginal lands as a part of a treaty or other accommodation as commonly occurred with other tribes and thus is was necessary to establish the taking of the Tribe's aboriginal lands by other proof. *See, e.g., United States v. Gemmill*, 535 F.2d 1145, 1148 (9th Cir. 1976). However, it is not open to the Tribe to argue, or this court to inquire, whether the Commission's finding that the riverbed was taken is supported by the record before the Commission. Jurisdiction to review the Commission's decision is vested exclusively in the Court of Claims. 25 U.S.C. § 70s(b) (Supp. 1982). Neither party appealed the Commission's findings.

were excluded. The first paragraph of the stipulation, approved by the Commission, states:

> [T]he Commission determined that [the Tribe] had proved aboriginal title to specifically described lands in Washington, Idaho and Montana, and that [the Tribe] was entitled to recover for the fair market value thereof, and *it was stipulated that the area contained 2,373,000 acres*.

12 Ind. Cl. Com. at 142 (emphasis added). The Commission reiterated in its findings of fact that compensation was awarded for 2,247,000 acres of dry lands and 126,000 acres of submerged lands. *Id.* at 149. The point was made again by the Tribe's own attorney in a letter to the Commissioner of Indian Affairs, dated January 13, 1963, informing the Commissioner that "[i]t was stipulated by counsel for both parties that the area

awarded by the Commission contained 2,373,000 acres, of which 2,247,000 acres were land, and 126,000 acres were water."

Despite this apparent clarity, the Tribe maintains the stipulation should be construed as covering only dry lands. The stipulation states the compensation of $3,000,000 was calculated on the basis of $1.34 per acre. Multiplying 2,247,000 acres by $1.34 yields $3,010,980, approximately the amount the Tribe actually received, while multiplying 2,373,000 acres by $1.34 results in a total of $3,179,820. Since the Tribe was not awarded the larger amount, the Tribe maintains the stipulation was meant to include only the dry acreage. However, the record reveals the contrary. As the Commission stated, "[n]o evidence was produced or suggested that the area under

water was of any special value." *Id.* at 159. It is thus apparent the Commission awarded $1.34 per acre for the dry lands and no compensation for the submerged lands.

The Tribe argues the Commission could not have found all 2,373,000 acres had been taken by the United States because that figure includes the Tribe's current reservation, which the United States has not taken. From this the Tribe argues the 2,247,000 acre figure, which excludes the submerged lands, must represent the lands the Commission found had been taken. One difficulty with the Tribe's argument is that the 2,247,000 acre figure also includes the current reservation since it excludes only the submerged lands. In any event, the January 13, 1963 letter from the Tribe's attorney to the Commissioner

of Indian Affairs eliminates any ambiguity. The Tribe's attorney informed the Commissioner "that the $3,000,000 figure is a net figure *after* deduction of all gratuitous offsets ... including the value of the 4,600 acre Kalispel Reservation set aside for the Tribe by the Executive Order of 1914." (Emphasis in original). In short, the $3,000,000 settlement figure was calculated on the premise that the Tribe's present reservation was not taken by the United States.[7]

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[7]We also note that even if the settlement confirmed the taking of the Tribe's aboriginal title to the present reservation, the Tribe could still assert title to the land (other than that beneath the navigable river) under the 1914 Executive Order. Thus, it would not be implausible that the Tribe would have agreed to relinquish its aboriginal title.

[5] The district court properly held the Tribe cannot assert a claim to the riverbed based upon aboriginal title.

B

The Tribe also asserts ownership of the riverbed as part of what it calls a "de facto reservation." The Tribe maintains that prior to the admission of Washington to the Union a series of actions by the United States treated the Tribe's current reservation, along with the bed of the river, as a reservation in fact, thereby establishing a reservation for the Tribe that included the river. The State counters that if a de facto reservation existed it did not include the bed of the river.

[6] The parties dispute the appropriate standard of review on this issue. The Tribe maintains it should be

allowed to proceed to trial if it has raised any triable issue of fact because, in its view, the district court ruled against it on summary judgment. *See Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989). The State contends an actual though truncated trial was held and therefore we must uphold the district court's judgment unless it was based upon a clearly erroneous finding of fact or a mistaken view of the law. *See United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984) (en banc). Because we conclude the Tribe's factual claims, even if true, are insufficient as a matter of law to establish the Tribe's title to the riverbed as part of a de facto reservation, we need not resolve this preliminary dispute.

The Tribe's theory, as described in its complaint, in motions before the district court, and in its brief before this court, is that in the latter half of the nineteenth century its members were forced into the area constituting its current reservation by the encroachment of non-Indian settlers; that the United States encouraged the exclusive occupation of the current reservation by the Tribe by denying non-Indians homestead rights, mineral rights, and railroad patents in this tract; and that the federal government provided services to the Tribe's members in this area as if they were living on a reservation. The Tribe also maintains that its members historically have been dependent upon the river at this location and that the United

Stats was aware of this dependence when it created the de facto reservation.

Assuming these claims, if true, may be sufficient to establish a de facto reservation, *see, e.g., Minnesota v. Hitchcock*, 185 U.S. 373, 389-90 (1902); *Sac & Fox Tribe v. Licklider*, 576 F.2d 145, 149-50 (8th Cir. 1978); 18 Op. Att'y Gen. 141 (1885), they are insufficient as a matter of law to reserve the bed of the river to the Tribe.

[7] A party seeking to establish that a grant by the United States includes the bed of a navigable river must meet a heavy burden. *See, e.g., Utah Div. of State Lands v. United States*, 482 U.S. 193, 196-98 (1987); *Montana v. United States*, 450 U.S. 544, 551-52 (1981); *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). As the Court wrote in *Montana*:

> [B]ecause control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of some international duty or public exigency. A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream.

Montana, 450 U.S. at 552 (citations and internal quotations omitted).[8] The proof

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[8]Weighty policy considerations underlie this presumption against conveyance of a riverbed to a private party. Navigable waterways are "chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes ...." *Shively v. Bowlby*, 152 U.S. 1, 49 (1894); *see also Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). Because these interests would be defeated by private ownership of the beds underlying navigable

offered by the Tribe is sufficient to overcome this strong presumption against conveyance of a riverbed.

The Tribe seeks to meet its burden by relying upon the cases in which we have held tribal dependence upon a river is an important factor in resolving a dispute over title to the riverbed. *See Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1258 (9th Cir. 1983); *Muckleshoot Indian Tribe v. Trans-Canada Enters., Ltd.*, 713 F.2d 455, 457 (9th Cir. 1983); *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982). In each of these cases, however, there was compelling evidence that the United States intended to include the disputed riverbed

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waterways, "[t]itle to such land [is] ... vested in the sovereign for the benefit of the whole people." *Utah Division of State Lands*, 482 U.S. at 196.

in the reservation, in addition to the tribe's historic dependence on the disputed river.

The Puyallups were confined by treaty to a reservation with no access to a river which was the center of their "spiritual, religious and social life." *Puyallup*, 717 F.2d at 1259 (citation and internal quotations omitted). Fighting broke out between Indians and non-Indians in part because of the unavailability of the river. *Id.* at 1260. A meeting between the Puyallups and Territorial Governor Stevens was convened to seek an end to the hostilities. At the meeting, "Governor Stevens reminded the Indians that he had promised to modify the treaty reservations if they were unsuitable." *Id.* (citation internal quotations omitted). As a result of the meeting, "the Puyallup Reservation,

at the insistence of the Indians, was enlarged specifically to include a segment of the Puyallup River." *Id.* at 1261. The Puyallups' specific insistence upon inclusion of the riverbed, followed immediately by expansion of the reservation by the United States to include the river, strongly suggested an intention on the part of the United States to include the riverbed within the newly enlarged reservation. Indeed, in *Muckleshoot,* a companion case decided the same day, we held this was the single most important factor in overcoming the presumption against conveyance. *Muckleshoot*, 713 F.2d at 458.

The existence of hostilities between the Puyallups and non-Indian settlers relating to the dispute over access to the river was also of great significance.

Puyallup, 717 F.2d at 1260. The Supreme Court has repeatedly held that resolution of disputes over title to a riverbed must be guided by "a congressional policy...to grant away land under navigable waters *only* 'in case of some international duty or public exigency.'" *Utah Div. of State Lands*, 482 U.S. at 197 (quoting *Shively v. Bowlby*, 152 U.S. 1, 50 (1894) (emphasis in original); *see also Montana*, 450 U.S. at 552. The outbreak of hostilities constituted the "public exigency" required by *Utah Div. of State Lands* and *Montana*, but absent here. *See Puyallup*, 717 F.2d at 1260.

It was only "in light of these pertinent facts" that the *Puyallup* court concluded the presumption against conveyance of a riverbed had been rebutted. *Id.*

In *Muckleshoot*, the same two factors, absent here, were also present. "[T]he Muckleshoot Reservation was expanded at the insistence of the Indians specifically to include a section of the White River on which the Tribe could continue to exercise its traditional fishing lifestyle." 713 F.2d at 458; and the expansion of the reservation was a response to a serious threat of hostilities that constituted a "public exigency." *Id.* at 457-58. Again, only in light of these two factors did we hold that the presumption against conveyance of the riverbed was overcome. *Id.*[9]

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[9]We do not mean to hold that these two factors are essential to any claim of tribal ownership to a riverbed, but only to emphasize that mere reliance upon a river is not enough to overcome the "strong presumption" against conveyance of a riverbed by the United States. *Montana*, 450 U.S. at 552.

Nor does *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), support the Tribe's position. There a treaty expressly included half of Flathead Lake within the boundaries of the reservation. *Id.* at 962. *Namen* thus fell squarely within the language of *Montana* that the intention to convey a lakebed could be found where the conveying instrument by its "terms embraces the land under the waters of the stream [or lake]." *Montana*, 450 U.S. at 552. There is no conveying instrument in this case that by its terms grants the bed of the Pend Oreille to the Tribe.

In contrast to the compelling factors present in *Puyallup*, *Muckleshoot*, and *Namen*, the Tribe offers no relevant evidence other than its dependence upon the river and the United States' awareness

of this dependence. The other evidence offered by the Tribe -- the concentration of the Tribe in the area of its present reservation, the exclusion of non-Indian settlers from that area, and the provision of federal services to members of the Tribe living there -- may be relevant to establishing the existence of a de facto reservation; but none of these events is probative of an intent on the part of the United States to convey the riverbed to the Tribe.

III

[8] We turn finally to the Tribe's claim that the district court erred in denying the Tribe's motion to amend its complaint in intervention to assert a claim under *Winters v. United States*, 207

U.S. 564 (1908).[10] The Tribe proposed the amendment approximately eleven months after the court entered judgment against the Tribe in Phase 2 of the trial, and approximately two weeks prior to the commencement of Phase 3. The district court rejected the proposed amendment as untimely. The question is whether the district court abused its discretion. *Hurn v. Retirement Fund Trust*, 648 F.2d 1252, 1254 (9th Cir. 1981).

Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "The propriety of a motion for leave to amend is generally determined by

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[10]In *Winters* and the subsequent case of *Arizona v. California*, 373 U.S. 546 (1963), the Supreme Court held that a reservation of land to an Indian tribe may include by implication rights of usage of adjacent waters to the extent necessary to fulfill the purposes of the reservation. *Winters*, 207 U.S. at 576; *Arizona*, 373 U.S. at 599-600.

reference to several factors; (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party." *Hurn*, 648 F.2d at 1254. *See also Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). The district court relied solely upon the first of these factors in denying the Tribe's motion as untimely. However, "[d]elay alone does not provide sufficient grounds for denying leave to amend ...." *Hurn*, 648 F.2d at 1254. The crucial factor is not length of delay, but prejudice. *Howey*, 481 F.2d at 1190. "Where there is a lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion "to deny leave to amend. *Howey*, 481 F.2d at 1190-91.

[9] The State urges us to decide on the record before us that the State would have been prejudiced if the amendment had been permitted. If prejudice were readily apparent from the record, we might decide the issue without benefit of findings by the district court. *See, e.g., Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). However, the record in the present case does not reflect what, if any, prejudice the State and the PUD would suffer if the Tribe were allowed to add its claim under *Winters*. We therefore reverse the district court's denial of the Tribe's motion for leave to amend, and remand for the district court to reconsider the motion. *See United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981).

Each party to bear its own costs on appeal.

AFFIRMED in part, VACATED in part, and REMANDED.

No. 88-3617

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT COURT

UNITED STATES OF AMERICA AS TRUSTEE FOR THE KALISPEL INDIAN TRIBE AND INDIVIDUAL ALLOTTEES,
Plaintiff/Appellee,

and

KALISPEL INDIAN TRIBE,
Intervening Plaintiff,

-vs-

PEND OREILLE COUNTY PUBLIC UTILITY DISTRICT NO. 1,
a municipal corporation,
Defendant,

and

DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON
No. CV-80-116 RMB

APPELLANT PEND OREILLE COUNTY PUBLIC UTILITY DISTRICT NO. 1'S PETITION FOR REHEARING AND SUGGESTION FOR HEARING *EN BANC*

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No. 88-3617

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT COURT

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian Tribe
and individual allottees,
Plaintiff/Appellee,

and

KALISPEL INDIAN TRIBE,
Intervening Plaintiff,

-vs-

PEND OREILLE COUNTY PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corporation,
Defendant,

and

DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-Intervenor-Appellant.

D.C. No. CV-80-116-JLQ

No. 88-3618

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian Tribe
and individual allottees,
Plaintiff-Appellee,

and

KALISPEL INDIAN TRIBE,
Intervening Plaintiff,

-vs-

PEND OREILLE COUNTY PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corporation,
Defendant-Appellant,

and

DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-Intervenor.

D.C. No. CV-80-116-JLQ

No. 88-3619

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian Tribe
and individual allottees,
Plaintiff-Appellant,

and

KALISPEL INDIAN TRIBE,
Intervening Plaintiff,

-vs-

PEND OREILLE COUNTY PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corporation,
Defendant-Appellee,

and

DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-Intervenor.

D.C. No. CV-80-116-JLQ

No. 88-3669

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian Tribe
and individual allottees,
Plaintiff,

and

KALISPEL INDIAN TRIBE,
Intervening Plaintiff-Appellant,

-vs-

PEND OREILLE COUNTY PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corporation,
Defendant-Appellee,

and

DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-Intervenor-Appellant.

D.C. No. CV-80-116-JLQ

No. 88-3618

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA AS TRUSTEE
FOR THE KALISPEL INDIAN TRIBE
AND INDIVIDUAL ALLOTTEES,
Plaintiff/Appellee,

and

KALISPEL INDIAN TRIBE,
Intervening Plaintiff,

v.

PEND OREILLE COUNTY PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corporation,
Defendant/Appellant,

and

DEPARTMENT OF NATURAL RESOURCES, STATE OF
WASHINGTON
Defendant-Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON
No. CV-80-116 RMB

APPELLANT PEND OREILLE COUNTY PUBLIC
UTILITY
DISTRICT NO. 1's PETITION FOR REHEARING
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District No. 1

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* * *

CERTIFICATE REQUIRED BY

CIRCUIT RULE 28-2.1

The undersigned counsel of record for Pend Oreille Public Utility District No. 1 certifies that the following parties who are in Washington State Supreme Court may be interested parties in the outcome of the line of ordinary high water determination. In No. 85-2--00128-8, the Pend Oreille County Public Utility District No. 1 filed a Complaint against the defendants captioned "Complaint for Declaratory Judgment re: Determination of Line of Ordinary High water; Or, In the Alternative Declaration Of Or Quiet Title To AN Overflow Easement: Or In The Alternative Petition In Condemnation." After judgment was entered against the State and the PUD based on collateral

estoppel based upon the decision of the United States District Court in this case, the PUD and State appealed to the Washington Supreme Court. The respondents own property bordering the Pend Oreille River in the vicinity of the Kalispel Indian Reservation. In fact, respondents own property known as Kalispel Indian Allotment No. 83.

Interested parties are Tombari Family Limited Partnership of Washington; William A. Tombari, Margaret K. Tombari, William A. Tombari, Jr. and Veronica M. Tombari.

This representation is made to enable judgment of the Court to evaluate possible recusal.

Jerry K. Boyd
Attorney of Record for Pend Oreille County Public Utility District No. 1

I. STATEMENT OF ISSUES ON PETITION FOR REHEARING.

A. In the Slip Opinion, did this Court's three-judge panel err in its determination and application of law relating to the establishment of the line of ordinary high water?

B. Was the District Court's finding that the line of ordinary high water was 2028 clearly erroneous and did this Court's three-judge panel err in affirming the District Court's finding of fact and conclusion of law?

C. Did this court's three-judge panel err in failing to certify the issue of the determination of the line of ordinary high water to the Washington Supreme Court or in refusing to stay the panel's decision pending the outcome of a related case now working its way through the Washington Supreme Court?

II. STATEMENT OF THE CASE.

The principal facts and the nature of the case and claims made by the parties as set forth in the Slip Opinion, pages 2483-2485, are substantially correct. However, there are some additional facts that are noteworthy and are set forth hereafter.

The Pend Oreille River is a navigable river. The State of Washington was admitted on November 11, 1889, on an equal footing with the original states by presidential proclamation [26 Stat., *Proclamations* 10] pursuant to an Enabling Act [25 Stat., Ch. 180], approved February 22, 1889. Section 8 of said Enabling Act authorized the people of the Territory of Washington to hold a constitutional convention of elected representatives and to hold elections to ratify a proposed constitution. Section 8

of the Enabling Act further provided that if the constitution was approved by the majority of the electorate in the Territory of Washington and if the constitution was:

> "republican in form, and if all the provisions of this Act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each [territory, including the Territory of Washington], and thereupon the proposed States shall have adopted constitutions and formed State government as herein provided shall be deemed admitted by Congress into the Union under and by virtue of this Act on an equal footing with the original States from and after the date of said proclamation."

The Constitution of the State of Washington which was approved by the people of the Territory of Washington prior to the presidential proclamation on November 11, 1889, contains Article XVII, § 1, which provides as follows:

> **Declaration of state ownership.** The State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide, and waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes...."

Finally, based upon the opinion of the three-judge panel of this Court at Slip Opinion, page 2486, reference is made to *Howard v. Ingersoll*, 54 U.S. (13 How.) 409 (1851).[1] Due to such citation and a quotation taken therefrom, it is also apparent that the hydrology of the Pend Oreille River and other rivers in the state of Washington may be significant. There is a substantial difference in the annual hydrological cycle of rivers in the eastern and southern states as opposed to the annual hydrological cycle of rivers

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[1] 14 L. ed. 189 shows that *Howard v. Ingersoll* is published at 54 U.S. (123 How.) 318 et seq.

elsewhere in the United States and particularly rivers in the state of Washington and the Pend Oreille River in the state of Washington. *Howard v. Ingersoll* involved a dispute on a river comprising the boundary between the state of Georgia and the state of Alabama wherein a river having a hydrological cycle entirely different than the hydrological cycle of the Pend Oreille River. The Pend Oreille River, as most other rivers in the western states, has an annual natural hydrological cycle which involves an annual rise in the spring of each year to an ordinary high water and a recession of the water to an ordinary low water in the summer months.[2] In contrast

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[2] Copies of hydrographs showing the flow of the Pend Oreille River over time commencing in 1913 and ending in 1950 are attached as Exhibit 1 in the appendix. These hydrographs are copies of plates 4 and 5 of the Project

to the ordinary and predictable annual cycle of the Pend Oreille River and other western rivers, the rivers in the eastern states and particularly those in the South have a substantial different annual cycle. In the eastern and southern states, the rivers may rise at any time when a rain event may occur at any time in the year. These facts are well stated in the Affidavit of Roland H. Binker, which was filed in this matter and which was submitted to the District Court. There is no dispute on these facts.[3]

Planning Report-Box Canyon Power Project-Pend Oreille River, which is Trial Exhibit No. 201. Plate 17 is a discharge curve that shows the relation between flow and elevation of the Cusick gage.

[3] A copy of the Affidavit of Roland H. Benker, an hydrologist, and copies of some of the exhibits he sponsored showing the hydrological cycles of various rivers is set forth in Exhibit No. 2 of the Appendix.

III. ARGUMENT.

ISSUE A. In the Slip Opinion, did this Court's three-judge panel err in its determination and application of law relating to the establishment of the line of ordinary high water?

Early in the history of the United States, the United States Supreme Court stated as follows:

> For when the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all of their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 366, 410; 10 L.Ed 997 1011 (1842). The *Martin* court went on to note that under the law of England prior to the Revolution, the king held that dominion and property in navigable waters as a

public trust for all of the people and that such public trust rights included fishing. *Id.* at 411, 10 L.Ed 1013. The court further noted that the public had such rights since the signing of the Magna Charta. *Id.* at 412, 10 L.Ed 1013-14. The court then noted that the benefit of such common rights were carefully preserved for the people; however, the court implied that a colony, which later became a state, may well have established a different policy than that which applied to the King of England. *Id.* at 412-413, 10 L.Ed 1014. There, the court stated that

> ... and there is nothing in the charter before us indicating that a different and opposite line of policy was designed to be adopted in that colony.

The point of the foregoing discussion is that it was one of the sovereign rights of the original states, and under the

equal footing doctrine is one of the sovereign rights of the State of Washington to decide, for itself, the policy which the state will follow with regard to navigable waters and the soils under them. This appears to be contrary to the opinion of the three-judge panel of this Court in *United States v. Pend Oreille Public Utility District No. 1 of Pend Oreille County*, Slip Op. at 2486. There, the court decided that federal and state law are the same and therefore did not resolve which law controls. However, the court thereafter cited several federal court cases which purportedly establish federal law relating to the establishment of the line of ordinary high water. The PUD contends that the three-judge panel of this Court has misconstrued *Howard v. Ingersoll*, which is the foundation of the

purported federal law relating to the line of ordinary high water. Secondly, the PUD contends that federal law relating to the line of ordinary high water is irrelevant since it is for each sovereign state to establish such law as shown in *Martin v. Waddell*.

The fact that the Ninth Circuit Court misconstrued *Howard v. Ingersoll* is apparent upon reading that case. Nowhere in *Howard v. Ingersoll* does it appear that the case dealt with a navigable river. In addition, the issue in *Howard v. Ingersoll* did not involve the establishment of a line of ordinary high water, but rather involved the establishment of a boundary between the states of Georgia and Alabama.[4] Furthermore, *Howard v.*

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[4] *Howard v. Ingersoll*, 54 U.S. (14 How.) 381, 397, 14 L.Ed. 189, 196 (1851).

Ingersoll did not involve the determination of the line of ordinary high water. Rather, the case involved the construction to be given to Articles of Cession dated June 16, 1802, between the United States and Georgia, by which Georgia ceded its claim to a western portion of territory which it claimed and by which Articles of Cession the western boundary of Georgia was established.[5] Under the Articles of Cession, the western boundary of Georgia, which became the eastern boundary of Alabama, was described as the "western bank of the Chattahoochee River." *Id.* Thus, the court in *Howard v. Ingersoll* was not attempting to describe the line of ordinary high water under circumstances where the water has an annual hydrological cycle, but was rather attempting to

[5] *Id.* at 413, 14 L.Ed. 203.

construe what was meant by "western bank" of the Chattahoochee River. In that particular case, the court chose the bank of the river in which the river was located most of the time. Indeed, in attempting to determine whether the high western bank or the low western bank was described in the Articles of Cession, the court noted that the high western banks "do not extend down to the water's edge at ordinary low water." *Id.* at 414. Indeed, in *Howard v. Ingersoll*, the most significant discussion related to whether the river stayed within the low western banks most of the time and further noted that the location of a mill at issue was actually covered by water in ordinary high water.

The three-judge panel of this Court has selectively quoted (and unfortunately mis-

cited) language from *Howard v. Ingersoll*. Slip Op. at 2486[6]. In *Howard v. Ingersoll*, the court was attempting to determine the intent of the commissioners who negotiated the Articles of Cession and were not attempting to determine the line of ordinary high water which establishes the boundary line of the sovereign waters and soils of navigable rivers which are held by states in their sovereign capacity.

Finally, the three-judge panel opinion quotes language from *Austin v. Bellingham*, 126 P. 59, 61 (1912), and states that the Washington Supreme Court has adopted as its rule for determining the line of ordinary high water under the state constitution the language selected from

[6] Based on the undersigned's reference to 14 L.Ed. 204, it appears that the quoted language came from 54 U.S. at pp. 415 and 416.

Howard v. Ingersoll. Slip Op. at 2487. The reason for the similarity in language is apparent when the origin of such language is traced. The language in *Austin v. Bellingham* actually came from 4 Words and Phrases at 3290, which, in turn, originated with *Welch v. Browning*, 87 N.W. 430 (Iowa 1901), which, in turn, related back to a misconstruction of *Howard v. Ingersoll*. One should not be surprised if language originating in an opinion is cited or quoted that such language would appear to be similar when cited or quoted. The fact that such language appears in *Austin v. Bellingham* does not support the conclusion that such language is not *dicta* nor does such language support the conclusion that when the Supreme Court of the State of Washington has before it the facts and evidence of this case, the

Supreme Court will not carefully consider such language in light of the evidence and facts herein and will not overrule such language when faced with such facts and evidence.

ISSUE B. Was the District Court's finding that the line of ordinary high water was 2028 clearly erroneous and did this Court's three-judge panel err in affirming the District Court's finding of fact and conclusion of law?

There is no basis in the record for the establishment of elevation 2028 feet above mean sea level as the line of ordinary high water on the Pend Oreille River. Indeed, the statement made by this Court in its Slip Opinion is not supported by the statements made in the same opinion. This Court's conclusion appears to be based upon one of two hydrological computations. Slip Op. at 2488. The hydrological computation referred to in

this Court's Slip Opinion is that the water is at or below elevation 2028 feet msl for three-quarters of the year. So what? That determination is purely a computation based on a flow duration curve. Such a mathematical computation based on a flow duration curve has never been used or relevant to the issue of determining the line of ordinary high water. At one time, the Department of Defense Corps of Engineers, attempted to utilize the use of inundation for 25 percent of the time derived from a flow duration curve to determine ordinary high water mark. See 40 Fed.Reg., p. 31,321 (July 25, 1975). Such attempt by the Corps of Engineers was soon abandoned by the Corps of Engineers. 42 Fed.Reg. at 37,129 and 37,163 (July 19, 1977). Thus, the 25 percent inundation rule was only

used by the Corps of Engineers on an interim basis for less than two years before such rule was abandoned as being inappropriate.

In its opinion the three-judge panel stated that "witnesses testified that prior to construction [of the Box Canyon Dam], hay was harvested, livestock was pastured, and wild carrots and onions were gathered on lands at and below the 2028 foot elevation." How does such statement or conclusion support drawing a line at 2028? Indeed, it is without question that vegetation, which cattle would eat, grew below elevation 2028. In fact, vegetation will grow down to the lowest level to which the water recedes in the summer, which in this case under natural conditions would be below elevation 2025. The issue raised by the PUD in *State* is

that there was no line in the vegetation at 2028 and there was and is no evidence to establish a line at elevation 2028.

A statement is made at Slip Opinion at 2489 that the District Court judge visually inspected the riverbank and observed partially submerged tree stumps near elevation 2028 feet. As was stated in oral argument, shown in the briefs and record referred to in the PUD's brief, and a fact which is not contested, at all times when the District Court judge observed the river, the water was many feet above 2028. There was no possible way for the court to observe any vegetation at 2028. The court did note in its findings that there were trunks of unhealthy looking coyote and whiplash willows with bases of which appeared "to be at 2028 to 2032 elevation." The record

before the district court established, without doubt, that coyote and whiplash willows grow down to and into the water at the lowest level reached by the water during the summer months. How can coyote or whiplash willows mark ordinary high water? Again, the PUD contends that the three-judge panel of this Court has erred in relying upon such evidence to support the district court's finding of a line of ordinary high water at 2028.

Finally, this Court cited, as evidence to support the district court's 2028 foot elevation portions of agreements between the PUD and individual Indian allottees for flowage easements. As stated by the district court in its findings No. 39, such flowage easements were obtained to resolve and settle disputes between the PUD and individual allottees and the

Tribe. There is no evidence that the state was involved with those settlement nor is there any evidence that the State of Washington had any knowledge or information concerning such settlements. Furthermore, there is no evidence that the elevation of 2028 identified in such settlement agreements constituted a line of any sort in the vegetation. Elevation 2028 in the settlement agreements was a settlement elevation, not an elevation for a vegetation line. The use of the settlement elevation of 2028 feet in the settlement agreements by the Court is, in actuality, an effort of this Court to grasp a hook on which to hang its hat to support the district court's finding of elevation 2028 as being the line of ordinary high water. In fact, a review of the record shows that there is absolutely

no evidence whatsoever anywhere in the record to support the establishment of any line of any kind in the soil or vegetation at elevation 2028 feet.

ISSUE C. **Did this court's three-judge panel err in failing to certify the issue of the determination of the line of ordinary high water to the Washington Supreme Court or in refusing to stay the panel's decision pending the outcome of a related case now working its way through the Washington Supreme Court?**

A case is now pending before the Supreme Court of the State of Washington where the very same facts and evidence is presented to the Supreme Court of the State of Washington. That case is *PUD v. Tombari Family Limited Partnership*, Washington Supreme Court Docket No. 57239-9. In the *PUD v. Tombari* case, the PUD and the State of Washington have raised the issue of the determination of the line

of ordinary high water under article XVII, § 1, of the Constitution of Washington, and, in their briefs, have argued that the language quoted by this Court in the Slip Opinion from *Austin v. Bellingham* is *dicta*, and, if followed by the court, means that the "line of ordinary high water" identified in the Washington Constitution is, in fact, the "line of ordinary low water." The Washington Supreme Court has retained that matter. A copy of the Order of the Washington Supreme Court is attached as Exhibit No. 3 in the Appendix. The undersigned anticipates that the matter will be set for oral argument before the Washington Supreme Court in due course and a decision on the determination of the line of ordinary high water under the facts and evidence in this case will be forthcoming.

Based upon the foregoing, it appears prudent for this Court to stay the opinion of the court pending the determination of the Supreme Court of the State of Washington in *PUD v. Tombari*. If the opinion of this Court is allowed to stand, it is very possible that the Washington Supreme Court will overrule the *dicta* in *Austin v. Bellingham* and may establish the line of ordinary high water to be based upon the annual rises that occur on the Pend Oreille River or the change in vegetation that results from such annual rises. It will be unfortunate and a miscarriage of justice if this Court establishes one rule of law relating to the establishment of the line of ordinary high water which determines the boundary of the waters and soils owned by the State of Washington in its sovereign capacity,

and the State of Washington, in such sovereign capacity, establishes a different line of ordinary high water. Based on the holding in *Martin v. Lessee of Waddell*, such a result would appear to be a violation of the sovereign rights of the State of Washington and clearly inconsistent with the law applicable with respect to the sovereign rights of states dated to the adoption and approval of the United States Constitution.

IV. SUGGESTION FOR REHEARING *EN BANC*.

The issues relating to the establishment of the line of ordinary high water on the navigable Pend Oreille River in the State of Washington is of great public importance for the State of Washington and all of its people. That issue is now pending before the Supreme Court of the State of Washington in *PUD v. Tombari*,

Supreme Court Docket No. 57239-9. As shown above, under the arguments for Issue A, the issue of determining the law of the State of Washington for the establishment of the line of ordinary high water under the Constitution of the State of Washington, article XVII, § 1, is a sovereign right belonging to the people of the State of Washington and its courts, and is a right that arises under the equal footing doctrine described in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987); *Montana v. United States*, 450 U.S. 544 (1981); and *United States v. Holt State Bank*, 270 U.S. 49 (1926). The sovereign rights of the original states was well established in *Martin v. Lessee of Waddell*, *supra*. The PUD and state have previously urged this Court to certify the issue of the

determination of the line of ordinary high water or to stay this Court's decision pending the outcome of a related case. Based upon this Court's conclusion with respect to federal law and state law applicable to the determination of the line of ordinary high water, the three-judge panel rejected the motions and requests of the PUD and the State to certify the issue to the state Supreme Court or to stay its decision. As previously stated, if the Washington State Supreme Court overrules the 1912 *dicta* in *Austin v. Bellingham* and rules that the line of ordinary high water is to be based upon the annual spring high water based upon the evidence that is before this Court, which evidence is also before the state Supreme Court, the prejudice that would result from allowing this Court's

opinion to become final without rehearing or without rehearing on the issue of certification to the state Supreme Court or stay of this Court's opinion is apparent. On the other hand, if rehearing is granted on the issue of the determination of the line of ordinary high water or if rehearing is granted and this Court certifies such issue to the Washington Supreme Court or stays this Court's decision pending the outcome of the case before the Washington State Supreme Court, such prejudice will be avoided.

Based upon the foregoing, and the significance of the issue of law to the people of the State of Washington, the PUD respectfully suggests that the issues identified above be reheard and that such rehearing be before this Court, *en banc*.

Respectfully submitted this 20th day of March, 1991.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

By_____
Jerry K. Boyd, WSBA #2099

Attorneys for Pend Oreille County Public Utility District No. 1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Petition for Rehearing and Suggestion for Hearing En Banc was mailed, postage prepaid, on the 20th day of March, 1991, to the following counsel of record:

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Docket Nos. 88-3617, 88-3618, 88-3619 and 88-3669

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA/KALISPEL INDIAN TRIBE,
Plaintiffs/Appellees

-vs-

PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1,
a municipal corporation
and
STATE OF WASHINGTON,
DEPARTMENT OF NATURAL RESOURCES,

Defendants/Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

HONORABLE RICHARD M. BILBY,
DISTRICT JUDGE

STATE'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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I.

INTRODUCTION AND STATEMENT OF COUNSEL

Pursuant to FRAP 40 the Department of Natural Resources, State of Washington petitions for rehearing and requests a stay of the Court's opinion until resolution of the state law issue relating to location of the ordinary high water line (OHWL) by the Washington Supreme Court. Alternatively, the State requests that the matter be reheard by the Court en banc.

The undersigned counsel is also counsel for the State in an appeal presently pending in the Washington Supreme Court entitled Public Utility District No. 1 of Pend Oreille County and State of Washington v. Tombari Family Limited Partnership, et al., docket number 57239-9. The state litigation involves the

location of OHWL on the Pend Oreille River on a former allotment in the Kalispel Indian Reservation now held in fee by a non-Indian (Tombari). The following issues are presented for review to the Supreme Court of Washington:

> "1. Should the prior Federal District Court determination of the riverward boundary of the Kalispel Indian Reservation preclude litigation of the riverward boundary of Tombari's property in state court?"
>
> "2. Should the prior Federal District Court interpretation of Art. 17, § 1 of our state constitution (presently on appeal to the Ninth Circuit Court of Appeals) be given preclusive effect in a subsequent state court proceeding?"
>
> "3. Did the trial court err by agreeing with the Federal District Court's interpretation of state law which was based upon a literal application of a portion of this Court's opinion in *Austin v. Bellingham*, 69 Wash. 677 (1912)?"

(State's Opening Brief in *Tombari* appeal, p. 3.)

Counsel has been informed that the Supreme Court has retained jurisdiction over the Tombari appeal, has entered an order extending the time allotted for oral argument and will set the matter for oral argument during Spring Term, 1991.

II.

THIS COURT SHOULD WITHDRAW ITS OPINION AND AWAIT THE WASHINGTON SUPREME COURT'S DECISION IN THE TOMBARI APPEAL

The trial court concluded and this Court agrees that state law is both applicable and controlling regarding the location of the line of ordinary high water.[1] The definitive construction and interpretation of state law is that which is given it by the highest court of the state. This rule has been directly

[1] The trial court's conclusion was based on *Oregon v. Corvalis, Sand & Gravel Co.*, 429 U.S. 363 (1977). No party to this appeal assigned error to this conclusion of law.

applied in a case which involved Art. 17, S 1 of Washington's Constitution:

> . . . whether a conveyance made by the state of land abutting upon navigable water does confer upon grantee any right or interest in those waters or in the land under the sand is a matter wholly of local law. *Shively v. Bowlby*, 152 U.S. 1, 38 L. Ed. 331, 14 Sup.St.Rep. 548. Upon such questions the provisions of the state constitution and the statutes of the state, and the decisions of its highest court are accepted by us as conclusive.

Port of Seattle v. Oregon & Washington Ry. Co., 255 U.S. 56, 63, 65 L. Ed. 500 (1921).

This Court focused on *Austin v. City of Bellingham* and defined the line of ordinary high water as "soil which is submerged so long or so frequently, in ordinary seasons, that vegetation will not grow on it." (Slip Opinion at p. 2487). This Court further observed that the question is what Washington law is <u>now</u> as

opposed to what it "may become." (Slip, p. 2488, fn. 3). If, as all parties agree, state law controls the resolution of this issue, the applicability of the *Austin* decision is at stake here. If the Washington Supreme Court in the pending Tombari appeal agrees with the arguments presented by the State regarding the interpretation and applicability of the *Austin* decision, then this Court's opinion will have been wrongly decided.[2] If, on the other hand, the Washington Supreme Court issues an opinion which is consistent with this Court's view of state

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[2] The *Austin* decision did not consider or address Art. 17, § 1, Constitution of Washington. The constitutional assertion of the State's title to the "bed and shores" of navigable rivers is not satisfied by *Austin* which limits the State's ownership to the river bed. Moreover, the facts of *Austin* deal with lakeshore property and differ substantially from those which obtain along the shores of a navigable river such as the Pend Oreille. *See*: State's Opening Brief Phase I, pp. 17-19 and pp. 28-31.

law and the *Austin* decision, then it can simply be issued without change. Thus, an opportunity is available for this Court to avoid possible error as to the state law issue. Our point here is that the outcome of this appeal should not be determined by the passage of time (i.e., the chronology of this matter versus the chronology of *Tombari*). The applicability of *Austin* and of Art. 17, § 1 of Washington's Constitution are fundamental questions which will be addressed by the Washington Supreme Court during Spring Term, 1991 in the Tombari appeal.

The Kalispel Tribe has participated at the state appellate level by filing a brief amicus curiae expressing its views on the state law issues (i.e., OHWL location) in the Tombari matter.

Withdrawal of the opinion under the conditions indicated would not subject any party to harm or prejudice. Our recommendation avoids the unpleasant and possibly embarrassing prospect of a conflict between federal and state courts on a significant state law issue occurring almost simultaneously or within a limited time frame.

III.

ALTERNATIVELY, THIS MATTER SHOULD BE RECONSIDERED EN BANC

The boundary between State owned beds and shores of navigable rivers is described in Art. 17, S 1, Constitution of Washington as ". . . up to and including the line of ordinary high water within the banks of all navigable rivers . . .." Section 1 has been held to have the effect of vesting in the State the entire and exclusive ownership of the beds and shores

of navigable waters. *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 501, 644 P. 735 (1901). This Court's opinion relied upon the 1912 *Austin* opinion. Unfortunately, *Austin* does not interpret Art. 17, § 1 and thus cannot provide a basis to determine the boundary of the State's ownership to the beds and shores of the Pend Oreille River. The language used in Art. 17, § 1 is "ordinary high water" and "ordinary high tide" to describe the landward boundary of the State's ownership of the beds and shores of navigable bodies of both fresh and salt water. One must assume that the intention of the framers of the state constitution was to describe comparable water levels as boundaries. There is no evidence available which would support a contrary inference. The State's position, based upon this constitutional

provision, is and always has been that the described line is to be located along navigable rivers by reference to the line of upland vegetation. The State has applied this rule and asserted title and actively managed both shorelands and tidelands based on the upland vegetation line as the landward boundary of its property. This administrative practice is consistent with the test adopted by the state court which established upland vegetation as the boundary line for tidelands. *See Harkins v. Del Pozzi*, 50 Wn.2d 237, 310 P.2d 532 (1957).[3]

Under the equal footing doctrine, the State acquired title to the beds and

---

[3] The *Harkins* vegetational test has been overruled and the term "ordinary high tide" now means the average of all high tides over a seventeen year lunar cycle. *See Hughes v. State*, 67 Wn.2d 799, 811, 410 P.2d 20 (1966); reversed on other grounds, *Hughes v. Washington*, 389 U.S. 290 (1967).

shores of all navigable waters within its borders upon admission with the Union. Its Constitution described the boundaries of the lands conveyed. The "ordinary high" language of Art. 17, § 1 can only have meaning if one has reference to the high flows of a river. The question posed is: How high does the river ordinarily rise? It makes no sense to exclude the very period when high annual flows occur (i.e., spring run-off). (Slip, p. 2488). Neither does the average of the high flows of a river result in establishment of a line of extraordinary high water or suggest flood flows as a boundary. Given the similarity and meaning between the terms "ordinary high tide" and "ordinary high water" as used in Washington's Constitution, there is no sound reason to apply the passage from *Words and Phrases* quoted in the

Austin opinion to this controversy. The State was not a party to *Austin* and, as previously stated, the constitutional assertion of the State's title to shorelands was not raised or decided in 1912 by the state court.

Also, this Court's affirmance of the location of OHWL at 2028 is in error. The Court's reliance upon the PUD flowage easements (slip, p. 2489) is improper because the State was not a party to such easements. The State's shoreland property boundary cannot be established by unilateral declarations by the PUD in easements conveyed to third parties.

There is no record basis for the statement that "visual inspection by the district court judge revealed partially submerged tree stumps near the 2028 level." (Slip, p. 2489). The Pend Oreille

River flow was well above 2028 on the day the district court judge made a visual inspection of the shoreline. It was physically impossible for the judge to have observed partially submerged tree stumps near the 2028 level for this reason and for the additional reason that none exist at elevation 2028 anywhere along the shores of the Pend Oreille River adjacent to the Kalispel Indian Reservation. (Slip, p. 2489).

There is no evidence in the record to support the existence of any distinctive line of vegetation visible at 2028. According to the testimony of local farmers, native wild grasses along the shoreline were cut as hay down to 2022. According to the field surveys conducted by qualified botanists along the shores, there is a continuum of wetland vegetation

from the line of upland vegetation (2041) down to the water's edge consisting of rhizome grasses. No identifiable or distinct line of different vegetation was located at 2028. (See: R. Vol. 5, p. 98; Affidavit of Dr. Carr, p. 16 at CR 202 and Exhibit 218). The trial court's findings of fact numbers 18, 19 and 20 were clearly erroneous and must be set aside. There is nothing in the record to support a distinctive line of vegetation at 2028 or anywhere else along the shores of the Pend Oreille River between the line of upland vegetation (2041) and the line of ordinary low water (2022) which occurs during periods of low flows in late summer and fall.

We, as a final reason for reconsideration of this matter en banc, believe that this Court erred in remanding this

matter for the trial court to reconsider the Kalispel Tribe's motion for leave to amend to add a new cause of action. As pointed out in the State's Answering Brief, Phase II at pp. 28-30, the Tribe waited five years after filing its complaint to seek to amend their complaint in this fashion. The proposed amendment occurred after discovery had been completed (in accordance with a schedule established by the trial court) and approximately two weeks before Phase III (damages) portion of the trial was scheduled to begin. Under these circumstances, there is both unreasonable delay and prejudice shown to the State because of the cut-off of discovery. This matter should not be remanded to the trial court.

IV.

CONCLUSION

Art. 17, § 1, Constitution of Washington declares the State's ownership of both the beds and the shores of all navigable waters to the line of ordinary high water or ordinary high tide. If this Court's ruling that OHWL along the Pend Oreille River is accepted as a correct statement of state law, this would mean that the State's ownership would extend to the line of average annual water along the shores of the Pend Oreille River (2028). Average water cannot mean "ordinary high" water as that term is used in Art. 17, § 1. Such a result would be inconsistent with the well established rules regarding the location of OHWL along salt water tidelands. Adoption of this rule to tidelands would mean their boundary is at

mean sea level rather than ordinary high tide per the *Hughes* decision. There is no semantic or logical reason for such a distinction based upon the similar boundary descriptions used in Art. 17, § 1. The long standing administrative assertion of the State's ownership of shorelands along navigable rivers would also be overturned and title would be unsettled as to many, many acres of valuable wetlands.

An issue of major public importance is here presented. There is no question but that the Washington Supreme Court is the only court which can decide this issue with finality. Under these circumstances, the proper course of action is to stay the opinion pending resolution of this issue by the Washington Supreme Court in the pending *Tombari* appeal.

Alternatively, we submit that there is no factual basis in the record to support the location of the line of ordinary high water at 2028 for the reasons previously stated and this matter should, accordingly, be reconsidered by the Court en banc.

Dated this 20th day of March, 1991.

Respectfully submitted,

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Nos. 88-3617, 88-3618, 88-3619, 88-3669

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA/
KALISPEL INDIAN TRIBE,
Plaintiffs/Appellees,

-vs.-

PEND OREILLE PUBLIC UTILITY
DISTRICT NO. 1, a municipal
corporation
and
STATE OF WASHINGTON,
DEPARTMENT OF NATURAL RESOURCES,
Defendants/Appellants.

CERTIFICATE OF SERVICE

I certify that I caused two copies of the State of Washington's Petition for Rehearing with Suggestion of Rehearing En Banc together with this Certificate to be served upon all counsel of record by this day depositing said documents in the United States mail, first-class postage prepaid, addressed to each attorney as follows:

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DATED this 20th day of March, 1991.

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Nos. 88-3617, 88-3618, 88-3619, 88-3669

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees,
Plaintiff-Appellee,
and
KALISPEL INDIAN TRIBE,
Intervening-Plaintiff,

-vs-

PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1,
a municipal corporation,
Defendant-Appellant,
and
DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-Intervenor.

D.C. NO. CV-80-116-JLQ

ORDER

Before: BROWNING, SCHROEDER and FLETCHER, Circuit Judges

The panel has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote on whether to rehear the matters en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

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No. 88-3617

AMENDED
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian Tribe
and individual allottees,
Plaintiff - Appellee

and

KALISPEL INDIAN TRIBE,
Intervening - Plaintiff

-vs-

PEND OREILLE PUBLIC UTILITY DISTRICT
NO. 1, a municipal corporation,
Defendant

and

DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-intervenor - Appellant

No. 88-3618

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian Tribe
and individual allottees,
Plaintiff - Appellee

and

KALISPEL INDIAN TRIBE,
Intervening - Plaintiff

-vs-

PEND OREILLE PUBLIC UTILITY DISTRICT
NO. 1, a municipal corporation,
Defendant - Appellant

and

DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-intervenor

No. 88-3619

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian Tribe
and individual allottees,
Plaintiff - Appellant

and

KALISPEL INDIAN TRIBE,
Intervening - Plaintiff

-vs-

PEND OREILLE PUBLIC UTILITY DISTRICT
NO. 1, a municipal corporation,
Defendant - Appellee

and

DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-intervenor

No. 88-3669

UNITED STATES OF AMERICA,
as trustee for the Kalispel Indian Tribe
and individual allottees,
Plaintiff

and

KALISPEL INDIAN TRIBE,
Intervening Plaintiff - Appellant

-vs-

PEND OREILLE PUBLIC UTILITY DISTRICT
NO. 1, a municipal corporation,
Defendant - Appellee

and

DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-intervenor - Appellee

APPEAL FROM the United States District Court for the Eastern District of Washington (Spokane).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, VACATED IN PART, AND REMANDED, with respect to Phases I and II.

Filed and entered March 6, 1991

No. 88-3617
(Together With 88-3618, 88-3619
and 88-3669)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
as Trustee for the Kalispel Indian Tribe
and individual allottees,
Plaintiff/Appellee,

and

KALISPEL INDIAN TRIBE,
Intervening-Plaintiff/Appellee,

-vs-

PEND OREILLE COUNTY PUBLIC UTILITY
DISTRICT NO. 1,
a municipal corporation,
Defendant-Appellant,

and

DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-Intervenor/Appellant.

DC# C-80-116-JLQ[RMB]
EASTERN DISTRICT OF WASHINGTON (SPOKANE)

MOTION FOR RECALL OF MANDATE AND FOR
RECALL OF ENTRY OF JUDGMENT

Public Utility District No. 1 of Pend Oreille County ("PUD") is the Appellant in Docket No. 88-3618 in the above-entitled matter. The State of Washington is the Appellant in Docket No. 88-3617, the United States is the Appellant in Docket No. 88-3619, and the Kalispel Indian Tribe is the Appellant in Docket No. 88-3669.

In its appeal, the PUD raised several issues, including issues concerning the line of ordinary high water (which was briefed and argued as part of Phase I) and raised issues concerning pre-judgment interest on the award of damages and issues concerning dismissal of the PUD's condemnation action. The issues concerning pre-judgment interest and the condemnation action have not been scheduled for briefing, argument or decision by this Court for the reasons set out below.

NINTH CIRCUIT HAS ONLY RENDERED A DECISION ON A PART OF THE APPEALS BEFORE IT.

All of the parties appealed to the Ninth Circuit Court of Appeals concerning the decisions of the Honorable Richard M. Bilby in Cause No. CV-80-116-JLQ[RMB]. In the early stages of the appeal, the appeal was bifurcated by various orders of the conference attorney. Copies of the relevant Orders are attached for reference. As the three-judge panel stated in its Opinion, only a portion of the case was briefed and decided. *United States v. Pend Oreille Public Utility District No. 1*, 926 F.2d 1502, 1505 (1991). As is noted in the Opinion, the Court determined issues concerning the line of ordinary high water, ownership of the river bed by the State, and the Tribe's Motion to amend its Complaint.

This Court stated (*id.* at 1505) that "the issues raised in Phase III are the subject of a separate appeal." Unfortunately, this was error. What actually occurred is that the issues outlined above were decided by the Court as "Phase 1 and Phase 2" and all of the remaining issues which were raised in the same appeals were left for determination at a later time in "Phase 3."

The reason for the bifurcation was obvious and agreed by the parties. In essence, the line of bifurcation was generally between liability and damages, with slight discrepancies. It was obvious if the District Court was reversed on either the issue of line of ordinary high water or the issue of ownership of the river bed, such result would have a substantial impact upon the remaining

issues. Now that this Court has affirmed the District Court on those issues, the remaining issues which were neither briefed nor argued before this Ninth Circuit Court of Appeals should now be scheduled for briefing and argument to decide the remainder of the case.

MOTION AND REQUESTED ACTION

MOTION

The PUD moves the Court to recall its mandate and to recall its judgment. The Court, through the Deputy Clerk, issued a Mandate dated June 19, 1991, wherein the Clerk noted that the original Mandate was amended to show issuance for Phases I and II only. A copy of the Amended Clerk's Mandate is attached. In addition, a copy of an Amended Clerk's Mandate received by the U.S. District Court for the Eastern District of Washington is attached. On

behalf of the PUD, the undersigned is uncertain and unclear concerning the status of this case. Under Supreme Court Rule 13.1, and Rule 13.4, parties may file a petition for a writ of certiorari within 90 days after the entry of a judgment of the United States Court of Appeals. The entry of a judgment, under these circumstances, is deemed to be from the date of the denial of a petition for rehearing. In this case, an opinion and decision has been rendered on only a part of the appeal. From the actions of this Court, it appears that a judgment has been entered even though the judgment is only on a part of the appeal.

REQUESTED ACTION:

The PUD requests the Court to withdraw its Mandate and to recall its judgment on the part of the appeals on which it has

ruled pending the outcome of the remainder of the appeals. Such result may probably be accomplished by the entry of an order recalling or staying mandate and recalling or staying judgment pending the completion of the remainder of the appeals before the Ninth Circuit Court of Appeals. If a stay of the mandate and judgment is not entered, it is quite possible that, out of precaution, the parties may be required to prepare and submit multiple petitions for writs of certiorari in order to avoid prejudice pending the outcome of the remainder of the appeals. The undersigned respectfully urges the Court to stay the mandate and judgment which has apparently been entered in the above-entitled matter pending the briefing, argument and decision of the remaining issues in appeals 88-3617, 88-3618, 88-3619 and 88-

3669, all of which arose out of the decisions of the United States District Court for the Eastern District of Washington under Docket No. CV-80-116-JLQ[RMB].

DATED this ___ day of _____, 1991.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

By_____
Jerry K. Boyd, WSBA #02099
Attorneys for Pend Oreille
Public Utility District No. 1

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that on the _____ day of July, 1991, I placed a copy of the foregoing Motion for Recall of Mandate and For Recall of Entry of Judgment in the United States mail, first-class postage prepaid, to the following counsel of record:

Robert Dellwo
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County Public Utility
District No. 1

No. 88-3617
(Together with 88-3618, 88-3619 and 88-3669)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
as Trustee for the Kalispel Indian Tribe and individual allottees,
Intervening-Plaintiff/Appellee,

-vs-

PEND OREILLE COUNTY PUBLIC UTILITY DISTRICT NO. 1,
a municipal corporation,
Defendant-Appellant,
and
DEPARTMENT OF NATURAL RESOURCES,
STATE OF WASHINGTON,
Defendant-Intervenor/Appellant.

DC# C-80-116-JLQ(RMB)
EASTERN DISTRICT OF WASHINGTON (SPOKANE)

STATE'S RESPONSE TO MOTION FOR RECALL OF ENTRY OF JUDGMENT

The Department of Natural Resources, State of Washington (DNR) is the appellant in docket number 88-3617. DNR was, therefore, an appellant before this Court regarding the issue concerning the line of ordinary high water (Phase I) and was respondent before this Court for purposes of the Kalispel Tribe's aboriginal title and de facto reservation claims to the river bed (Phase II). The damages issues resolved by the trial court (Phase III) were reserved for determination by this Court at a later time. Therefore, DNR agrees with the request made by the PUD to recall the Court's mandate and judgment in order to render a complete judgment on all issues pending in this consolidated appeal.

DNR is not a "target defendant" for purposes of the United States' and

Kalispel Tribe's claims for monetary damages. However, DNR most strenuously objects to the characterization of the Tribe's water right claim as "Phase IV" of this proceeding. This Court ruled (slip opinion pp,. 2498-99) that the district court's denial of the Tribe's motion for leave to amend to add a *Winters* water right claim should be remanded for its reconsideration. No matter how the trial court resolves this issue, it does not affect the posture of this appeal. The Phase III damages issue relating to the twin claims of ordinary high water and aboriginal title has been resolved by the trial court, remains pending before this Court, and is ripe for decision. The fact that a belated and unrelated *Winters* water right claim may be acted upon by the trial court in a manner favorable to the Tribe

(by bringing the matter on for trial) does not provide a basis for denial of the PUD's motion for recall.

DNR, respectfully suggests that this Court stay the mandate and judgment pending the briefing, argument and decision of the remaining Phase III issues in docket numbers 88-3617, 88-3618, 88-3619, and 88-3699 (consolidated).

DATED this 19th day of July, 1991.

KENNETH O. EIKENBERRY
Attorney General

J. LAWRENCE CONIFF
Senior Counsel, WSBA # 1989
Assistant Attorney General
Attorneys for Department of
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(206) 586-0729

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that on the 19th day of July, 1991, I placed a coy of the foregoing State's Response to Motion for Recall of Entry of Judgment in the United Sates mail, first-class postage prepaid, to the following counsel of record:

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No. C-80-116

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,
and
KALISPEL INDIAN TRIBE,
Plaintiff-Intervenor,

-vs-

PEND OREILLE COUNTY PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation,
Defendant,

and

DEPARTMENT OF NATURAL RESOURCES,
State of Washington,
Defendant-Intervenor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

FINDINGS OF FACT

Introduction

1. This civil action was brought by the United States as trustee for the Kalispel Indian Tribe and Individual Kalispel Indian Allottees holding the beneficial interest in land along the banks of the Pend Oreille River. Plaintiffs seek damages from the Pend Oreille County Public Utility District No. 1 for unlawful trespass in the form of back water and erosion caused by the construction and maintenance of the Box Canyon Dam.

2. Three issues are before the Court at this time for determination:

A. The ordinary high water line of the Pend Oreille River as it passes through the Kalispel Indian Reservation;

B. The amount and cause of any erosion that has occurred on

Reservation land as a result of the operation of Box Canyon Dam; and

C. The effect of certain flowage easements.

Two issues have been reserved for later determination:

1. The amount of damages, if any, found to have resulted from erosion caused by the Box Canyon Dam, and

2. Adjudication of the Kalispel Indian Tribe's claim of aboriginal title to the riverbed up to the ordinary high water line.

Parties, Jurisdiction and Venue

3. The United States, the original plaintiff, brought this action as trustee for the Kalispel Tribe of Indians and individual members of the tribe who hold beneficial interests in the allotted lands on the Kalispel Indian Reservation. Pend Oreille County Public Utility District No. 1 (PUD) is a municipal corporation operating in the State of Washington. Its district includes all of Pend Oreille

County. The Kalispel Indian Tribe (Tribe), plaintiff intervenor, is a Tribe of Indians living on the Kalispel Reservation. The Reservation contains several forty acre allotments situated on a ten mile stretch bordering the Pend Oreille River, in the Northeast portion of the State of Washington. The state of Washington, defendant intervenor, manages the public lands of the state through its Department of Natural Resources.

4. All of the acts complained of occurred in Pend Oreille County, Washington, and all of the parties reside in the State of Washington. This court has jurisdiction pursuant to 28 U.S.C. §1345.

Historical Background

5. The state of Washington was admitted to the Union on November 11,

1889. The Kalispel Indian Reservation was established by Executive Order on March 23, 1911. The individual allotments on the Reservation, except as specified below, were approved by the Secretary of the Interior on July 6, 1925 and January 23, 1933. Trust patents for allotments 99, 104, 107, and 108 were subsequently granted to individual Indians.

6. In the 1950's the defendant PUD constructed a hydroelectrical project on the Pend Oreille River downstream from the Reservation known as the Box Canyon Dam (Dam) which commenced operation in 1955. The Pend Oreille River is and was at all relevant times a navigable waterway. (Admitted Facts No. 1). No trees were cut down along the Reservation during the construction of the Dam.

7. Albeni Falls Project is a Corps of Engineers dam upstream (south) from the Kalispel Indian Reservation.

Determination of Ordinary High Water Line

BACKGROUND

8. The banks of the Pend Oreille River consist of clay, sand and silt and, in some areas, gravel. A majority (approximately 70% of the lineal feet) of the banks along the Kalispel Indian Reservation are relatively steep and have sloughed or have been eroded away from time to time. The remainder of the reservation that borders on the river is comprised of sloughs, some gradually sloping areas and hummocks. (Admitted Facts No. 2).

9. There are substantial and long standing hydrological reports of the flow of the Pend Oreille River from Newport,

Washington, in Pend Oreille County, to the point where the Pend Oreille River crosses the Canadian border. These records extend over a period of time of approximately 40 years prior to the construction of the Box Canyon Dam and extend to the time of trial. Such records are a reliable indication of the flow and water surface elevations of the Pend Oreille River through the years and at various times of the year. (Admitted Facts No. 3).

10. The Box Canyon Dam does not affect the water surface elevation of the Pend Oreille River when the river is flowing at approximately 90,000 cubic feet per second (c.f.s.) and is at an elevation of approximately 2041 above mean sea level as measured by the Cusick water gage. (Admitted Facts No. 4).

11. Approximately one-half of the total annual flow of the Pend Oreille River occurs during the two or three months of high water in the spring of the year. The other one-half occurs during the remaining 9 or 10 months of the year. (Admitted Facts No. 13).

12. Below Cusick gage elevation 2035, Box Canyon Dam has a substantial effect upon the water surface elevation and time during which the water surface is above what would have occurred under natural conditions. (Admitted Facts No. 14).

13. Water is held higher now in the Cusick vicinity during the low flow times that it was before the Box Canyon Dam. (Admitted Facts No. 17).

14. This higher elevation of low water has resulted in various islands,

upon which edible grass grew, being submerged permanently.

15. The river falls approximately one-third of a foot for each mile it passes through the Reservation. Therefore, a reading of elevation 2041 at the Cusick gage (mile 70.09) would translate (assuming identical water flow) into readings of 2041.6 two miles upstream (south) and 2040.4 two miles downstream (north).

VEGETATION

16. Varying types of vegetation abound by the Reservation. Rough grass starts in the lowest elevation and progresses upwards to willows, black cottonwoods, red tip hay, and finally conifers and timothy hay.

17. Both by on the scene inspection (by foot and aboard a boat) and review of

photographic exhibits, the Court has observed evidence of two distinctive lines on the terrain. (Exh. 29-36, 38, 39, 46 L-O)

Elevation 2028

18. The first line appears at approximately 2028 and represents the dividing line between any edible vegetation and no vegetation, (water in most cases). The vegetation at the lower level consists of grass edible by cattle. This grass has some minimal nourishment value for range cattle. It is not good enough for dairy cattle who produce more milk when fed on the timothy hay which is grown at higher levels. At the lower level there are also small numbers of coyote and whiplash willows. These species are primarily visible in the steep bank areas. (Exh. 35, 36). There are

occasional black cottonwoods (generally at the approximate elevation of 2037-2038), but this specie primarily appeared above the 2041 elevation.

19. The existence of the edible grass down to the 2028 elevation was supported by the testimony of various credible Indian and non-Indian witnesses who had lived in the area prior to 1955. No agricultural (tilling or cultivating) of the soil took place below the 2041 elevation. There are several small islands in the river in the area of the reservation on which wild grasses grow. One island with a peak elevation of approximately 2031 used to be a source of wild carrots and onions for the Indians. It has been covered by water since the

Dam. There are no other sources of wild carrots or onions on the Reservation land.

Elevation 2041

20. The second distinctive line is at elevation 2041. It is evidenced by two different factors.

A) In the gradually sloping areas (30% of the banks) there is a change in vegetation from rough grass to a grass containing more nourishment and the appearance of bushes similar to those circled in red by the Court on Exhibit 36.

B) In the steep bank areas (70%) of the line appears at or near the top of the river bank. (Exh. 30, 33). Below the line appear a few rather unhealthy looking coyote and whiplash willows and miscellaneous weeds. In several areas many of the whiplash

willows are partially covered by water. The base of their trunks appear to be at the 2028 to 2032 elevation. Most of these willows have sustained serious, if not fatal, damage from beavers. Throughout the area there was evidence of serious and repeated instances of beaver damage both below (willows) and above (log pole pine) elevation 2041. The distinction between the steep banks and the gradually sloping areas is depicted in Exhibit 23. The areas circled by the Court in red are the steep banks and those in green the gradually sloping areas, (with grass below the 2041 elevation). In Exhibit T-2, part Z, an old photograph taken on the Reservation in early 1920's or '30's the

distinction between the elevations is also apparent.

MATHEMATICAL CALCULATIONS

21. When the flow of water in the river is 90,000 c.f.s. the elevation at the Cusick gage will be 2041. This was true before and after the construction of the Albeni Falls Dam south of the Reservation and the Box Canyon Dam north of the Reservation.

22. For each reduction of 5000 c.f.s. the water elevation at the Cusick gage will drop approximately one foot (Exh. 20) e.g., a 60,000 c.f.s. flow results in a water elevation of 2035 and a 30,000 c.f.s. flow, an elevation of 2029.

23. By calculation, both the mean and median high water lines after 1955 were approximately 2041. This calculation based on Exhibits 49A and 232 uses only

the highest point of flow during the high water season, (May-June spring snow melt and runoff). No consideration is given to the number of days the water remains at the highest water point or what the water elevation levels are during the rest of the year. (This calculation by defendant's expert was in accordance with Corps of Engineer standards for Lake Michigan.)

24. Plaintiff's expert made his determination of 2028 to 2029 prior to 1955 by selecting that elevation where the water exceeds the elevation 25% of the time each year. This was the standard used by the Corps of Engineers until 1977 when it was abandoned.

25. Another of defendant's experts, Mr. Sewell, made his determination by doing a backwater profile based upon the

various elevations produced by the water flows (c.f.s.). He too claimed the ordinary high water line (OHWL) to be 2041.

EROSION

26. Erosion occurred along the banks of the Pend Oreille River in the vicinity of the Kalispel Indian Reservation before and after the construction of the Box Canyon Dam.

27. Some of the forces that cause erosion and sloughing of the river banks at issue include:

(A) Saturation of the soil during annual high waters;

(B) Saturation of the soil by precipitation and surface water runoff;

(C) Rate of recession of the annual high water;

(D) Freezing and thawing of the banks;

(E) Characteristics of the soil;

(F) Tractive force of flowing waters of the river;

(G) The affect of gravity;

(H) Cattle tramping and other animal activity along the banks;

(I) Construction activities of man.

28. Presently, along the Kalispel Indian Reservation, there is a relatively stable beach along the shore of the Pend Oreille River between elevations 2031 and 2034.

29. Presently, the normal water surface elevation at Cusick for the operation of Box Canyon Dam after the end of the high water flows is between elevation 2031 and 2033 at the Cusick Gage.

30. The Box Canyon Project causes water to back up through Box Canyon to the Albeni Falls Project, during low water flows.

31. Evidence along the banks of the river support both parties' contentions as to the cause of erosion. Plaintiff claimed it resulted from below due to wind and wave action on the bank during the higher low water levels (now 2030-34). Defendants contend it occurred from above as a result of flood waters and freezing conditions during the winter and spring.

32. Both Mr. Weatherly's survey and the photometric studies of Mr. DeGross contained varying margins of ± errors. However, the failure of plaintiffs to offer sufficient evidence to contradict Mr. DeGross' estimates of horizontal changes in the river results in a failure

to carry the burden of proof on this issue. Although Mr. Weatherly's survey may constitute some evidence on this point, it was not taken at the same places as the prior Corps of Engineers survey. Also the prior survey was done for hydrolic purposes not bank erosion and thus is subject to more than normal ± errors. The Court therefore finds that there has not been increased erosion at the bank of the river along the Kalispel Reservation subsequent to 1955.

FLOWAGE EASEMENTS

33. In 1956, the State of Washington granted the PUD the right to overflow the bed and shores of the Pend Oreille River up to the ordinary high water line (OHWL).

34. Certain "flowage easements" were obtained in 1955 by the District from certain individuals allottees and the

Kalispel Tribe on the Kalispel Indian Reservation.

35. The allottees and the Tribe were paid valuable consideration for the flowage easements.

36. Individual allottees and the Kalispel Tribe granted warranty easements to the PUD, approved by the Secretary of the Interior, for a period of 50 years on March 4, 1955 for portions of the following described lands:

> Allotment T-105-(now tribal) SW 1/4 NW 1/4, Sec. 17 and Lot 6, Sec. 18 T33N, R44 EWM, Wash.
>
> Allotment T-18 (now tribal in part) NW 1/4 NW 1/4, Sec. 17; and Lot 1, Sec. 18, T33N, R44 EWM, Wash.
>
> Allotment 30 - SE 1/4 SW 1/4, Sec. 8, T33N, R44 EWM, Wash.
>
> Allotment 83 - Lot 3 and 4, Sec. 8, T33N, R44 EWM, Wash.
>
> Lot 6 of Sec. 6 and Lot 5, SW 1/4 NW 1/4 and NE 1/4 SW 1/4 of Sec. 5, T33N, R44 EWM, Wash.

37. The easements described above provide as follows:

> "During the haying season which is approximately July 1 to September 15th of each year, whenever Albeni Falls Dam is releasing not more than 20,000 cfs of water, Box Canyon Dam gates will be operated so that the level of the water at the Cusick gaging station will not exceed elevation 2028 feet above mean sea level, United States Coat and Geodetic Survey Datum (1947 adjustment)."

38. In the late 1960's a decision was made to operate the Box Canyon Dam with two feet of backwater, thus raising the water elevation along the Reservation during low water periods (9-10 months). These warranty easements which provided that water elevation would not exceed 2035 were obtained for valuable consideration from various members of the tribe and allottees.

39. The easements obtained to avoid further litigation, evidenced the knowledge of the PUD that landowners along the river were using the land above 2028 and subsequently 2035 for cattle grazing purposes.

CONCLUSIONS OF LAW

1. This Court has jurisdiction under 28 U.S.C. §1345, and the Eastern District of Washington is the proper venue.

2. The Court has previously ruled (June 21, 1983) that plaintiffs had the burden of proof and the law of the state of Washington controls this case.

3. The pre-1955 OHWL was elevation 2028 at the Cusick gage.

4. The post-1955 OHWL is elevation 2034 at the Cusick gage.

5. Because of the six foot increase in the OHWL due to the construction of Box Canyon Dam, the plaintiffs have lost the ability to graze livestock on the lands inundated by the new elevation. They are therefore entitled to recover damages for such trespass to the extent they have not executed flowage easements to the defendant PUD.

6. Any judgment for costs shall abide the final outcome of this case.

OPINION

The Court has determined the OHWL by following the language of the Washington Supreme Court in *Austin v. Bellingham*, 69 Wash. 676, 126 P. 59 (1912):

> High water mark does not mean the height reached by unusual floods, for these usually soon disappear. Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes,

> nor yet does it mean meadow land adjacent to the river, which, when the waters leave it, is adapted to and can be used for grazing or pasturing purposes. The line, the, which fixes the high water mark is that which separates what properly belongs to the river bed from that which belongs to the riparian owner--that is, the owner of adjoining land, Soil which is submerged so long or so frequently, in ordinary seasons, that vegetation will not grow on it, may be regarded as a part of the bed of the river which overflows it.

There is no doubt in the Court's mind that pre-1955 the tribe members grazed and pastured their livestock down to the 2028 Cusick gage elevation. Subsequent to 1955 the waters covered those areas up to elevation 2034 and made them unsuitable for grazing.

Under *Austin* even though the land between elevation 2028 and 2034 was covered with water during the spring run off they were indeed:

> meadow land adjacent to the river, which, when the waters leave it, is

> adapted to and can be used for grazing or pasturing purposes.

Austin at 681.

The state of Washington's request that the Court adopt a mean high water line (mathematical calculation) is not supported by the case law. Furthermore, the statute, Wash; Rev. Code Section 90.58.030, was not adopted until 1971, some 16 years after the construction of the Box Canyon Dam.

The mathematical certainty of using the mean high water level appeals to the Court's sense of precision and finality, but it does not comport with the Washington decision.

The parties may immediately commence discovery on the damage issue. The damage issue will track the same schedule as the Court has previously set for the issue of aboriginal title.

DATED: August 26, 1983.

Richard M. Bilby
United States District Judge

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